IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1192 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAGINBHAI JAGUBHAI CHAUDHARY - Appellant(s)
Versus
STATE OF GJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MRS SHILPA R SHAH for Appellant(s) : 1,
PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 22/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellant has preferred this appeal

under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment and order dated 22-10-1999 passed by the learned Addl. Sessions Judge, Surat camp at Vyara in Sessions Case No. 168 of 1998, convicting him for the offence punishable under Section 302 of the I.P. Code and sentencing him to undergo life imprisonment and to pay fine of Rs.400/-, in default, to undergo simple imprisonment of one month.

2. In brief, the prosecution case was that the appellant had married to one Miraben and had two daughters; deceased Tinaben aged about 15 years, Ansuya 13 years and son Kiran aged about 10 years. Before 1 ½ years of the incident, Miraben died in an accident. Deceased Tinaben was studying in 8th Standard and the accused did not like her behaviour as she had gone wrong way since last one year and had scolded her. She was keeping illicit relations with Bhikhubhai Maganbhai Chaudahri, Atul Narsing Chaudhari and Prakash Narsing Chaudhari residing in Bedi Falia of village Madhi, Taluka Bardoli, Dist. Surat. Despite scolding by the accused deceased Tinaben did not improve her behaviour.

3. On 15-5-1998 at about 19-00 to 19-30 hours when deceased Tinaben was preparing 'chappaty'

in the house the accused inflicted three blows of wooden pestle which is generally used for thrashing paddy, on the head of deceased Tinaben, as a result thereof, Tinaben succumbed to the injuries. At that time Dhaniben, the mother of the accused who was in the compound came running and started shouting.

4. On the basis of information given by the accused himself offence was registered as I. CR No. 112 of 1998 at Bardoli Police Station for the offence punishable u/s 302 of the I.P. Code and investigation was started. During the course of the investigation, statement of the witnesses were recorded and inquest pachanama, panchanama of scene of offence and panchanama of recovery of muddamal articles were drawn. Dead body of Tinaben was sent for postmortem and the accused was arrested.

5. On completion of the investigation, charge sheet was laid before the Court of the learned Judicial Magistrate, First Class, Bardoli, Dist. Surat for the offence punishable under Sections 302 of the I.P. Code. As the offence was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Surat camp at Vyara and it was registered as Sessions Case No. 168 of 1998. The learned

Addl. Sessions Judge, Surat camp at Vyara framed charge Exh. 5 against the accused for the offence punishable section 302 of the I.P. Code and the same was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence to prove the charge levelled against the accused. On completion of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against him in the evidence. In his further statement recorded u/s 313 of the Code of Criminal Procedure, 1973 the accused denied having committed the offence and stated that he has been falsely implicated in the offence.

6. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge found the appellant guilty for the offence punishable under Section 302 of the I.P. Code and sentenced him to undergo the sentence as mentioned hereinabove. Being aggrieved and dissatisfied by the impugned judgment, the the appellant has preferred the present appeal.

7. We have heard the learned advocate Ms. Shilpa Shah for the appellant and Mr. K.P. Rawal,

learned A.P.P. for the State at length and in great detail. We have also perused the judgment of the trial court as well as the record and proceedings of the case.

8. Learned advocate Ms. Shilpa Shah for the appellant submitted that there is no incriminating evidence against the appellant except the evidence that he filed the F.I.R. which is not admissible in the evidence. The prosecution has not produced any evidence to prove the motive and there is no corroborative evidence in support of the prosecution case. She also submitted that even the circumstantial evidence is not sufficient to implicate the appellant in the offence and the case has not been proved by unbroken chain of events, and therefore, the learned trial Judge has committed error in convicting the appellant and hence the appeal is required to be allowed and the appellant may be acquitted of the offence charged against him. In support of her submissions, she has relied on the decisions in the case of **Aghnoo Nagesia V. State of Bihar, reported in AIR 1966 SC 119 and Bheru Singh s/o Kalyan Singh V. State of Rajasthan, reported in 1994 SCC (Cri.) 555**.

9. While opposing the appeal, the learned

A.P.P. Mr. Rawal submitted that the evidence clearly establishes involvement of the appellant in the offence. The place where the dead body was found was occupied by the appellant. The appellant himself had lodged the FIR which clearly indicates involvement of the appellant in the offence. The evidence adduced by the prosecution establishes complete chain of events, and therefore, the learned trial Judge was justified in convicting the appellant for the offence punishable u/s 302 of the I.P. Code and no interference is warranted in the impugned judgment.

10. In order to prove that the death of deceased Tinaben was homicidal in nature, the prosecution examined P.W. 1 Dr. Santoshkumar Siddheswar Kadvane at Exh. 7 who performed postmortem of dead body of deceased Tinaben. According to the witness, the dead body had one external injury which is recorded in Column No.17 of postmortem report Exh. 8 and the internal injuries found on the dead body were sufficient in the ordinary course of nature to cause death. The witness opined that such injuries were possible by hard and blunt object like wooden pestle. In the cross-examination the witness admitted that death was possible on account the injuries found on the dead body. The prosecution produced

postmortem report at Exh. 8. It indicates the external injury as well internal injuries found on the dead body. According to the Doctor, the cause of death was on account of the injuries on brain (right side franto-parietal occipital part) by hard and blunt object resulting into shock and death. In view of this evidence, the prosecution proved beyond reasonable doubt that death of Tinaben was homicidal in nature.

11. The prosecution examined P.W. 5 Rajubhai Rameshbhai Chaudhari at Exh. 13 who is pancha witness of the panchanama of scene of offence Exh. 14 and panchanama of recovery of cloths of Hasmukhbhai Exh. 15. According to the witness, he and one Bhagirathbhai were called by the police at the police station and were taken to the place of the incident and panchanama Exh. 14 was drawn and thereafter P.W. 6 Hasmukh produced cloths and panchanama Exh.15 was drawn. In the cross-examination the witness admitted that one panchanama was prepared at the police station and other was prepared at Madhi outpost. The panchanama Exh. 15 indicates that the cloths were produced in the hospital and panchanama was drawn there.

12. Panchanama of scene of offence Exh. 14 indicates that panchas were called at Bedi falia

– Shiva falia, Madhi near the house of Jagabhai Kedadhabhai Chaudhari. In view of this discrepancy with regard to drawing of both the the panchanamas, we are of the view that the panchanamas cannot be relied upon to connect the appellant with the offence as it becomes doubtful as to whether the panchanamas were drawn at the place shown therein or at the place deposed by the witness.

13. The prosecution examined P.W. 6 Hasmukhbhai Jagabhai Chaudhari, the brother of the appellant, at Exh. 17. According to the witness, on the day of the incident on receiving call from P.W. 7 Pravinbhai, he went to the house of the appellant where Tinaben was lying with bleeding from her head. Therefore, he and Pravinbhai took Tinaben to Madhi Hospital where she was declared dead. The witness denied that appellant killed Tinaben. The evidence of this witness also indicates that there are houses near the house of the appellant and at the time of the incident Dhaniben had gone to fetch milk.

14. The prosecution also examined P.W. 7 Pravinbhai PPrabhubhai at Exh. 18. The evidence indicates that the witness was sitting on 'otla' near the house of the appellant and P.W. 6 Hasmukhbhai was sitting in the courtyard

situated behind the house of one Jivabhai and at that time Dhaniben raised shouts to run as Tinaben was killed, therefore, the witness called P.W. 6 Hasmukhbhai and they went to the house of appellant and saw that Tinaben was lying bleeding from her head. The evidence also indicates that except Dhaniben no one was present there. The witness does not know as to who killed Tinaben.

15. Looking to the evidence of P.W. 6 Hasmukhbhai Jagabhai Exh. 17 and P.W. 7 Pravinbhai PPrabhubhai Exh. 18, it appears that there are contradictions with regard to the presence of Dhaniben at the time of the incident. According to one witness Dhaniben was not present when the witness reached at the place of the incident. Whereas the other witness deposed about presence of Dhaniben. None of the witnesses has stated about the presence of the appellant at the time of the incident. In view of this, it becomes clear that no one had witnessed the incident and the appellant was nowhere found in the vicinity of the place of the incident.

16. The prosecution examined Investigating Officer P.W. 9 Prakashchandra Vasudev Vyas at Exh. 25 who carried out the investigation. It appears from the evidence of this witness that on

the basis of the information given by the appellant, the investigation was started. According to the witness, the arrest panchanama Exh. 27 was drawn by him. The panchanama indicates that blood stained cloths of the appellant were recovered from him. However, blood samples of deceased Tinaben or the appellant were not collected. Therefore, though F.S.L. report Exh. 20 indicates presence of blood marks on the cloths it does not conclusively prove that the blood marks belonged to the blood group of the deceased. Therefore, the evidence does not involve the appellant in the commission of the offence.

17. As discussed earlier, the panchanama of scene of offence Exh. 14 indicates that the offence was allegedly committed in the house bearing No. 1021 situated at Bedi falia of Madhi village. But there is no evidence to indicate that the said house was in exclusive possession of the appellant. Even there is no investigation that the house was occupied by the appellant. As observed earlier, the panchanama is also not reliable. In view of the fact that the prosecution case was that deceased was of easy virtue and the circumstances in which she was found dead, possibility of involvement of some one else in the offence cannot be ruled out.

18. The prosecution produced panchanama of recovery of clothes of witness P.W. 6 Hasmukhbhai Jagabhai Chaudhari at Exh.17, panchanama of clothes of deceased Tinaben at Exh. 19 and panchanama of clothes of appellant at Exh.27. The clothes were sent for analysis to F.S.L. for examination and F.S.L. report is produced at Exh.20. It indicates the presence of blood Group-A on clothes. However, F.S.L. report Exh. 20 does not connect the appellant with the offence.

19. In view of above evidence, the only evidence to connect the appellant with the offence is F.I.R. Exh. 26 which according to the prosecution case, the appellant himself gave to the police. It is alleged in the FIR that Tinaben had gone wrong way and was keeping illicit relations with Bhikhubhai Maganbhai Chaudhari, Atulbhai Narsingh Chaudhari and Prakash Narsingh Chaudhari despite his objection and therefore he had scolded her. It is further alleged that at about 7-00 to 7-30 in the evening Tinaben was preparing 'Roti' in the house and her mother Dhaniben was in the courtyard, at that time, he gave three pestle blows on the head of Tinaben and she died on account of the injuries. In view of this, it is a confessional F.I.R.

20. In the decision in **Aghnoo Nagesia V. State of Bihar, reported in AIR 1966 SC 119**, the Supreme Court has held as under

> **"The first information report recorded under Section 154 Criminal P.C.. as such is not substantive evidence, but may be used to corroborate the informant under Section 157 of the Evidence Act on to contradict him under Section 145 of the Act, if the informant is called as a witness. Where the accused himself gives the first information the fact of his giving the information is admissible against him as evidence of his conduct under S. 8 of the Evidence Act. If the information is non-confessional, it is admissible against the accused as an admission under S. 21 of the Evidence Act and is relevant. But a confessional first information report by the accused to a police officer cannot be used against him in view of S. 25 of the Evidence Act.**

21. In the present case, the F.I.R. given by the appellant is confessional information regarding commission of offence. In view of the settled principle of law, the F.I.R. lodged by the appellant cannot be relied upon to connect the appellant with the offence, as it is not admissible in evidence.

22. Learned advocate for the appellant has also relied on the decision of the Supreme Court **Bheru Singh s/o Kalyan Singh V. State of Rajasthan, reported in 1994 SCC (Cri.) 555**, wherein the Apex Court has held as under :

> **"When confessional F.I.R. is lodged by the accused himself, confessional part is not admissible in the evidence except to the extent permissible under Section 27.**

23. In view of above decision, the F.I.R. filed by the accused in the instant case cannot be used against appellant.

24. In view of above, there is no other evidence except the F.I.R. to connect the appellant with the offence. Therefore, in our view, the learned trial Judge committed error in convicting the appellant for the offence punishable u/s 302 of the I.P. Code and hence the appeal is required to be allowed and the appellant is required to be acquitted of the charge levelled against him.

25. For the reasons recorded in the judgment, the present appeal is allowed and the judgment and order of conviction dated 22.10.1999 passed by the learned Additional Sessions Judge, Surat camp

at Vyara in Sessions Case No.168 of 1998 is set aside and present appellant Naginbhai Jagubhai Chaudhari is acquitted of the offence punishable u/s 302 of the I.P Code and he is ordered to be set free forthwith, if he is not required in any other offence. The fine, if paid, be returned to the appellant.

26. The muddamal be disposed of as directed by the trial court.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

/JVSatwara/